SUPREME COURT, U.S.
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No. 92-1684

In the Supreme Court of the United States

OCTOBER TERM, 1992

MCI TELECOMMUNICATIONS CORPORATION, PETITIONER

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Communications Commission may permit certain telephone companies to provide interstate service without filing tariffs.

2. Whether, in considering a complaint filed by one telephone company seeking damages and injunctive relief against another telephone company that had not filed tariffs, as permitted by the applicable FCC rule, the FCC had authority to deny the damages claim on equitable grounds and to dismiss the claim for injunctive relief while initiating a rulemaking proceeding to reconsider the challenged rule.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 978 F.2d 727. The opinion of the Federal Communications Commission (Pet. App. 20a-30a) is reported at 7 F.C.C. Rcd. 807.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1992. Petitions for rehearing were denied on January 21, 1993. Pet. App. 31a, 32a. The petition for a writ of certiorari was filed on April 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Subsection (a) of Section 203 of the Communications Act of 1934 requires telephone companies to file tariff schedules with the FCC listing the interstate services they offer and the rates they charge for those services. 47 U.S.C. 203(a). Subsection (b)(2) of that same Section authorizes the FCC to "modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions," with the single exception that the FCC may not require notice of "more than one hundred and twenty days" before a tariff takes effect. 47 U.S.C. 203(b)(2) (Supp. III 1991). Subsection (c) states that carriers may not offer service except under tariff schedules "unless otherwise provided by or under authority" of the Communications Act. 47 U.S.C. 203(c). Other Sections of the Act require that rates be just and reasonable (Section 201(b)) and not unreasonably discriminatory (Section 202(a)); authorize the FCC to suspend, investigate, and prescribe rates, and in some circumstances to order refunds (Sections 204, 205); and permit the filing of complaints with the FCC, which has authority to investigate "in such manner and by such means as it shall deem proper," and to require carriers to pay damages or to cease and desist from unlawful conduct (Sections 207-209).

In a series of orders under the *Competitive Carrier* rulemaking proceeding, the FCC in 1979 began to adopt rules reducing, in increments, the requirements imposed on telephone companies lacking market power. By 1983, the Commission had relieved most "non-dominant" carriers such as peti-

tioner MCI Telecommunications Corp. of the general obligation to file tariffs. See *Fourth Report and Order*, 95 F.C.C. 2d 554 (1983). However, non-dominant carriers remained (and still remain) subject to the substantive requirements that their rates be just and reasonable and not unreasonably discriminatory. The *Fourth Report* adopted rules that permitted but did not require non-dominant carriers to forbear from filing tariffs—a policy sometimes called "permissive detariffing." The *Fourth Report* was not challenged directly on judicial review.

A subsequent order in the *Competitive Carrier* proceeding made the detariffing of non-dominant carriers mandatory: Under the rules adopted in that order, such carriers no longer were *permitted* to file tariffs with the FCC. See *Sixth Report and Order*, 99 F.C.C. 2d 1020 (1985). MCI challenged the *Sixth Report* in the D.C. Circuit and won a ruling that the FCC lacked authority "to prohibit MCI and similarly situated common carriers from filing tariffs." *MCI Telecomm. Corp.* v. *FCC*, 765 F.2d 1186, 1188 (D.C. Cir. 1985). In rejecting the FCC's argument that MCI's petition was an untimely challenge to rules and policies adopted in the *Fourth Report*, the court said that the mandatory detariffing rules "fundamentally altered" the earlier permissive detariffing program. 765 F.2d at 1190. The court declined to reach the question "whether the FCC's earlier permissive orders are invalid," *id.* at 1196, even though that question had been raised in the briefs.

Although respondent AT&T had initially raised statutory objections to detariffing, see *Second Report and Order*, 91 F.C.C. 2d 59, 64 (1982), throughout the *Competitive Carrier* proceeding AT&T primarily

objected to what it perceived as unfair asymmetrical regulatory treatment of dominant and non-dominant carriers. See, *e.g.*, *First Report and Order*, 85 F.C.C. 2d 1, 17-18 (1980); *Second Report and Order*, 91 F.C.C. 2d at 63 n.13, 64; *Fifth Report and Order*, 98 F.C.C. 2d 1191, 1193 (1984). AT&T never sought judicial review of any of the *Competitive Carrier* orders. And ultimately, both before and after the D.C. Circuit's decision in *MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186 (1985) AT&T argued before the FCC and in court that the Commission had authority under Section 203 to remove the requirement that carriers file interstate tariffs. See *Sixth Report and Order*, 99 F.C.C. 2d at 1027; *MCI Telecommunications Corp.* v. *FCC*, No. 84-1402 (D.C. Cir.), AT&T Br. at 41-42 (filed Jan. 9, 1986).

2. On August 7, 1989, AT&T filed this adjudicatory proceeding in which it objected to the FCC's permissive detariffing policy. AT&T's complaint to the FCC alleged that "MCI has provided and continues to provide interstate common carrier services to selected customers at rates, and upon terms and conditions, that are not specified in MCI's tariffs." Letter, dated August 7, 1989, from Francine Berry, AT&T, to Secretary of FCC, at 1 ("Berry Letter"). AT&T acknowledged that the Commission, in the *Competitive Carrier* proceeding, had "adopted rules * * * purport[ing] to make optional the filing of tariffs by 'nondominant' carriers." Berry Letter at 1. AT&T complained, however, that "[t]he Commission's regulatory reforms ha[d] not kept pace" with interexchange competition, and stated that its complaint challenged the permissive detariffing policy as incon-

sistent with Section 203, which it read as requiring the filing of tariffs. Berry Letter at 1-2.

Protracted discovery disputes between AT&T and MCI began in the Fall of 1989 and continued into the following summer. By that time, the Commission had initiated a separate rulemaking proceeding to reassess the state of interexchange competition and to determine, among other things, whether AT&T, like MCI and others, should be treated as a "non-dominant" carrier. *Competition in the Interstate Interexchange Marketplace* (CC Docket No. 90-132), Notice of Proposed Rulemaking 5 F.C.C. Rcd. 2627, 2649 (Apr. 13, 1990). The FCC believed that the outcome of the new rulemaking might have a bearing on AT&T's complaint, since AT&T's comments in the *Interexchange Competition* rulemaking urged the FCC to classify AT&T as a non-dominant carrier (Comments of AT&T in Docket 90-132, at iv, viii, 7 (filed July 3, 1990)), and the Berry Letter (at 1-2) had explained that AT&T's "fundamental" reason for filing the complaint against MCI was its dissatisfaction with the asymmetrical regulation of dominant and non-dominant carriers and the pace of further regulatory reforms. In addition, in order to coordinate the two proceedings effectively, the Commission transferred responsibility for the complaint proceeding from the Common Carrier Bureau's Enforcement Division to its Policy and Program Planning Division, which had responsibility for the *Interexchange Competition* proceeding. See Letter dated July 3, 1990, from Greg Weiss, Enforcement Division, to AT&T and MCI. The Commission did not act on the complaint while the *Interexchange Competition* proceeding went forward.

On September 16, 1991, the Commission released its decision in the *Interexchange Competition* proceeding. *Report and Order* (CC Docket No. 90-132), 6 F.C.C. Rcd. 5880 (1991). Although the Commission in that order gave AT&T some additional regulatory flexibility in light of competitive developments in the interexchange market, it did not place AT&T in precisely the same regulatory status as its non-dominant rivals. 6 F.C.C. Rcd. at 5894-5908. In particular, the Commission did not extend its permissive detariffing rules to AT&T. 6 F.C.C. Rcd. at 5897.

AT&T responded almost immediately by filing a petition for a writ of mandamus asking the D.C. Circuit to compel the FCC to act favorably on its complaint against MCI. See AT&T Petition for Writ of Mandamus to the Federal Communications Commission, D.C. Circuit No. 91-1487, at 13-18 (filed Oct. 4, 1991). After calling for a response by the Commission, the court of appeals denied the petition in light of the Commission's commitment to act on the complaint by January 31, 1992. *Order*, D.C. Circuit No. 91-1487, (filed Jan. 24, 1992). On January 28, 1992, the Commission released the *Order* on review and a related *Notice of Proposed Rulemaking* proposing to consider again its permissive detariffing rules. *Tariff NPRM*, 7 F.C.C. Rcd. 804 (1992).

In the *Order* at issue, the Commission denied AT&T's complaint insofar as AT&T sought damages for MCI's failure to file tariffs in the past, and the FCC dismissed the complaint insofar as AT&T sought injunctive relief requiring MCI to file tariffs in the future. Pet. App. 26a. With respect to AT&T's damages claim, the Commission concluded that "it would be manifestly unfair to entertain AT&T's claim

that MCI's alleged past conduct, which the Commission [had] explicitly approved in advance, may give rise to a finding of liability." *Id.* at 27a. With respect to AT&T's request for injunctive relief, the Commission noted that, although agencies have broad discretion to make policy via either rulemakings or adjudications, "rulemaking proceedings are more appropriate for considering general rules of widespread applicability." *Id.* at 28a. In this case, the Commission determined, AT&T was "in practical effect" challenging its permissive detariffing rules—rules constituting "one of the cornerstones of our regulation of the [competitive] long-distance industry." *Ibid.* The FCC concluded, under those circumstances, that it would be inappropriate "to consider a modification or repeal of [permissive detariffing], with so potentially widespread an impact, in the context of a two-party adjudicatory proceeding, as opposed to a rulemaking proceeding." *Ibid.* Simultaneously with its dismissal of AT&T's prayer for prospective relief, the Commission initiated a notice and comment rulemaking, with an expedited pleading cycle, to consider whether its permissive detariffing rules should be modified or repealed. *Tariff NPRM*, 7 F.C.C. Rcd. 804 (1992); see Pet. App. 29a-30a.

3. The FCC completed its expedited rulemaking proceeding with a vote at a public meeting on November 5, 1992, while this case was pending in the D.C. Circuit. AT&T and the FCC apprised the court promptly of the Commission's action, and AT&T sent the court a copy of the Commission's news report announcing the vote by letter dated November 5. The Commission released the text of its rulemaking decision on November 25. *Rulemaking Order*, 7

F.C.C. Rcd. 8072 (1992). The *Rulemaking Order* retained the permissive detariffing rules and set forth a comprehensive analysis of the Commission's justification for those rules, including a discussion of significant congressional action since the adoption of the rules that indicated acquiescence or ratification. AT&T filed a petition for review of the *Rulemaking Order*, and that proceeding is pending in the D.C. Circuit. D.C. Circuit No. 92-1628.

4. On November 13, 1992—eight days after the FCC announced the completion of the expedited rulemaking proceeding—the D.C. Circuit issued its judgment in this case. The court of appeals first held that "it was arbitrary and capricious for the Commission to dismiss AT&T's complaint" against MCI without deciding whether permissive detariffing is contrary to Section 203 of the Communications Act, as AT&T alleged. Pet. App. 12a. Although the court acknowledged that agencies such as the FCC generally have "a fundamental choice" whether to proceed by adjudication or rulemaking, it held that such a choice was not available here because the agency's "responsibilities as an adjudicator" required it to resolve AT&T's complaint on the merits. *Id.* at 9a. The court of appeals characterized the FCC's choice to proceed by rulemaking as "a sort of administrative law shell game" designed "to avoid judicial review of the rule." *Id.* at 8a. The court did not mention the FCC's commitment at the September 1992 oral argument to resolve the rulemaking proceeding by November 1992, or that the FCC had completed its rulemaking proceeding before the court issued its judgment.

Having found the FCC's *Order* to be an arbitrary and capricious disposition of AT&T's complaint, the court next refused to remand the substantive issue concerning the validity of the permissive detariffing policy to the FCC or to defer a ruling on that issue to a proceeding on review of the FCC's rulemaking decision. In declining to remand the issue, the court of appeals stated (1) that a remand would "allow the FCC's troubling tactics" of delay to succeed (Pet. App. 12a); (2) that a remand was not necessary, in light of the D.C. Circuit's 1985 opinion in *MCI* v. *FCC*, which "virtually settles the issue" (Pet. App. 13a); and (3) that the validity of the permissive rules was before the court in this case, because the FCC "necessarily relied on the *Fourth Report* in its decision to dismiss AT&T's complaint" (*ibid.*). The court thus proceeded to consider the merits of the permissive detariffing rules established by the FCC in 1983 in the *Fourth Report*.

Reading *MCI* v. *FCC* as reserving judgment on the validity of the permissive detariffing policy only as an exercise of prosecutorial discretion, the court held that "[a]s a substantive rule, the *Fourth Report* is simply not defensible in this court." Pet. App. 16a. The court of appeals noted that the FCC had relied on Section 203(b), the provision authorizing the FCC to "modify any requirement" of the Communications Act, in adopting the permissive detariffing policy, and conceded that the argument that Section 203(b) authorizes the FCC to modify the tariffing requirement "was not insubstantial when made initially." Pet. App. 16a. The court also acknowledged that the 1985 opinion in *MCI* v. *FCC*—which it apparently interpreted as having rejected the "not insubstantial"

argument of the agency interpreting its own organic Act—had not cited *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), even though *Chevron* had been decided first. Pet. App. 16a n.11. The court of appeals remanded the case to the FCC for further proceedings consistent with the court's opinion. *Id.* at 19a.

The FCC and MCI filed petitions for rehearing and suggestions of rehearing en banc. The FCC suggested that the en banc court hear this case in conjunction with the separate proceeding in which AT&T had sought review of the November 1992 *Rulemaking Order* that reaffirmed the permissive detariffing policy. In such a proceeding, the Commission suggested, the en banc court would have an opportunity to review the FCC's rules on the basis of factors that necessarily were not considered when the panel elected to review those rules solely "on the basis of the reasoning offered when the rule was originally promulgated." Pet. App. 15a. In particular, the Commission pointed out that its *Rulemaking Order* had relied on more than ten years of congressional acquiescence in its permissive detariffing rules and on subsequent legislative action that made no sense in the absence of such rules and thus constituted a ratification of the permissive detariffing policy. The court of appeals denied rehearing.

ARGUMENT

MCI's petition for a writ of certiorari should be denied. The first question presented—concerning the merits of the Commission's permissive detariffing policy—involves a matter of substantial importance, but review of the validity of that policy would be

premature. The second question presented, involving the D.C. Circuit's erroneous procedural rulings, does not raise an issue of general importance warranting review by this Court.

1. The court of appeals' rejection of the Commission's permissive detariffing rules is a matter of substantial concern. As the Commission noted in ruling on AT&T's complaint, the rules represent a "cornerstone" of its regulation of the long-distance industry, and their removal is likely to have an adverse and anticompetitive impact on many providers of telecommunications services and their customers. Pet. App. 28a, 59a-61a. Nevertheless, review in this case would be premature.

It was precisely for the purpose of examining fully the economic and legal bases for the permissive detariffing rules that the Commission conducted the extensive rulemaking that culminated in the *Rulemaking Order* of November 25, 1992. That major decision is currently before the court of appeals. The Commission has not yet had the opportunity to submit its full justification for the permissive detariffing rules to the court of appeals and to secure an appellate decision that takes account of that justification. Indeed, the Commission has consistently maintained in the present case that the merits of the permissive detariffing policy are not properly at issue —in substantial measure because to argue the validity of the rules in the court of appeals in this case risked the agency's prejudging the rulemaking proceeding that then was ongoing. Although the court of appeals thought it appropriate to decide the validity of the rules on the basis of the rationale the agency gave when originally adopting them ten years

ago (Pet. App. 15a), the Commission's *Rulemaking Order* makes clear that much has happened since then. Many participants in the industry have come to rely on the permissive detariffing rules, and the practical advantages of the rules and their utility in promoting competition have been demonstrated. Moreover, Congress has taken subsequent action which the Commission views as legislative ratification of the permissive detariffing rules. *Id.* at 51a-55a. Nonetheless, review of the rules' validity by this Court would be premature unless and until a decision by the court of appeals sets aside those rules on review of the *Rulemaking Order* after full consideration of the Commission's justification.

2. We agree with MCI that the court of appeals was mistaken in characterizing the Commission's procedure here as a "shell game" or a deliberate attempt to avoid a challenge to the merits of its rules. The agency's initial deferral of a ruling pending the decision in its *Interexchange Competition* investigation was clearly warranted. The subject matter of that proceeding related directly to the policy judgments underlying the detariffing rule, and it might have produced relief that would have satisfied AT&T without addressing the difficult legal issues the permissive detariffing rules raise. Indeed, AT&T did not press the question of delay by filing a mandamus petition until after it found the outcome of the *Interexchange Competition* proceeding unsatisfactory.

The further delay pending a new rulemaking directed specifically to the detariffing rule itself was also justified. AT&T and MCI were obviously not the only parties having substantial interest in the rules:

Invalidation of the rules would have an adverse industry-wide impact on other carriers and on customers as well. Initiation of a rulemaking proceeding that would allow all those parties to participate in the decision making process was plainly warranted. Moreover, once the Commission initiated that proceeding, it adhered to as expeditious a schedule as it could in light of the number and variety of commenters, and the time necessary for them to formulate their views and for the agency and its staff to digest them. Finally, it is clear that the Commission acted with both good faith and speed in completing the rulemaking expeditiously and in bringing its action in that proceeding to the court's attention promptly while this case was still under submission in the D.C. Circuit. Yet in its subsequent decision the court of appeals never acknowledged the existence of the Commission's important rulemaking decision.

Under the circumstances, we believe the court of appeals' harsh criticism of the procedures used by the FCC to be unjustified. But that being said, we must also say that the court's decision on the procedural issue is unlikely to have any significant effect in future cases. The court acknowledged the general principles that an agency may make law by rulemaking or adjudication, and that an agency may secure a broad range of public comment when conducting rulemaking proceedings. Pet. App. 9a-10a. As we understand the decision, the only practical limitation it places on the agency is that the FCC may not dismiss a Section 208 complaint while going forward with a rulemaking proceeding. We are not aware of any prior case involving similar facts, and we assume

that there are not likely to be similar cases in the future. Given the peculiar facts of this case, the court's procedural holding does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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